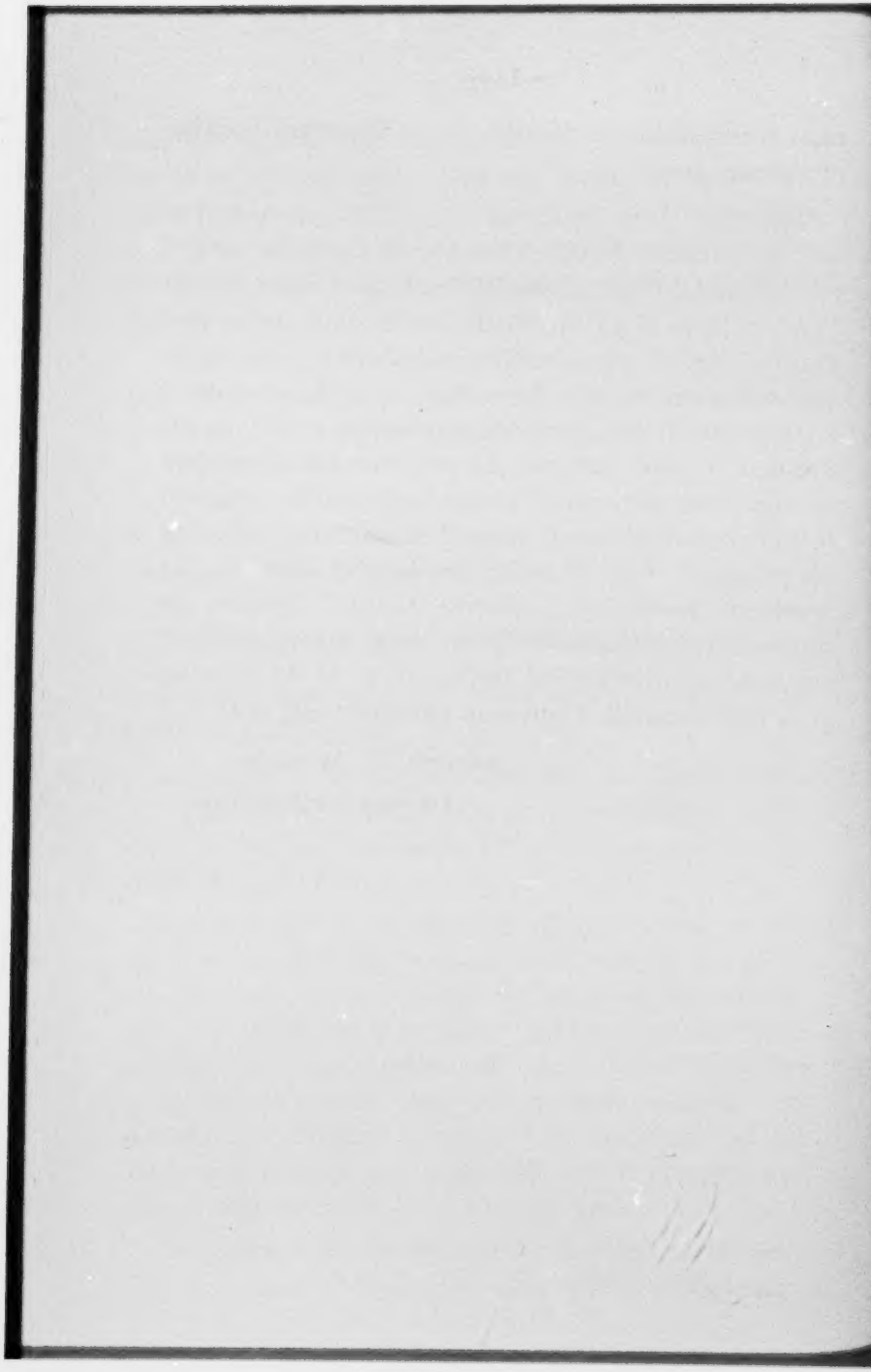

IN THE

Supreme Court of the United States

October Term, 1940

No. .....

WENZEL & HENOCH CONSTRUCTION COMPANY,

Petitioner,

vs.

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit by Circuit Judge Denman is reported in 115 Fed. (2d) 25. The opinion of District Judge Yankwich [R. 391-403] is unreported.

Jurisdiction.

The opinion of the Circuit Court of Appeals and the order for a mandate were filed October 15, 1940. A petition for rehearing was duly filed; such petition was denied November 27, 1940. Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of Facts.

The statement of facts and questions presented appear in the annexed petition for certiorari.

Errors to be Urged.

(1) That the trial court was guilty of prejudicial error in holding that as a matter of law the Company could not recover in *quantum meruit* for the reasonable value of labor and materials furnished.

(2) That the trial court was guilty of prejudicial error when it granted the District's motion to strike that portion of the Company's complaint referring to the District's geological report and alleging that both parties entered into the contracts relying upon and believing the information contained therein to be descriptive of the actual conditions which would underlie performance.

(3) That the trial court was guilty of prejudicial error in excluding the geological report from evidence and in excluding other testimony tending to establish that when the contract was made both parties believed the actual conditions to be accurately described in said report.

(4) That the trial court committed prejudicial error in refusing to allow certain amendments to the Company's complaint.

(5) That the trial court committed prejudicial error in refusing to hold that the District's seizure of the work because of alleged delay combined with its previous refusal to pay a progress payment amounted to a breach of contract.

ARGUMENT.

I.

The District Court and Circuit Court of Appeals in Disposing of This Case Have Failed to Apply, or to Reach a Result Consistent With, the Local Law of California.

The Supreme Court of California was among the first to adopt the relatively modern and more equitable theory of contract law that impracticability due to excessive and unreasonable difficulty or expense is as valid an excuse against the strict enforcement of contract obligations as objective impossibility in the strict sense.

Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 Pac. 458, L. R. A. 1916F, 1 (1915);

Transbay Const. Co. v. City and County of San Francisco 35 F. Supp. 433 (N. D. Cal. 1940);

See,

Christin v. Superior Court, 9 Cal. (2d) 526, 533, 71 Pac. (2d) 205, 208 (1937);

6 *Williston, Contracts* (Rev. Ed. 1938), §1931;

Restatement, Contracts (1932), §454.

In *Mineral Park Land Co. v. Howard, supra,* the defendants who had contracted to build a bridge, entered into an agreement with the plaintiff, a nearby land owner, whereby the defendants were to take from the plaintiff's land at a stipulated price all the gravel and earth necessary in the construction of the proposed bridge. The defendants used 101,000 cubic yards of gravel of which they procured 50,869 cubic yards at a place other than the plaintiff's premises. The trial court found that the plain-

tiff's premises contained earth and gravel far in excess of 101,000 cubic yards, but that only the amount actually taken by the defendants was above the water level, and for the defendants to have taken any more, though not impossible, would have entailed great expense and delay and would not have been practicable from a financial standpoint. The California Supreme Court held that the defendant had a valid excuse for not taking more gravel, refusing to apply the doctrine that difficulty of performance does not excuse one from performing an act which is not in its nature impossible. The Court said:

> "Although there was gravel on the land, it was so situated that the defendants could not take it by ordinary means, nor except at a prohibitive cost. To all fair intents then it was impossible for defendants to take it.
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> * * * * * * * *
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> " 'A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost.' I. Beach, Contr. Sec. 216. We do not mean to intimate that the defendants could excuse themselves by showing the existence of conditions which would make the performance of their obligation more expensive than they had anticipated, or which would entail a loss upon them. But, where the difference in cost is so great as here, and has the effect, as found, of making performance impracticable, the situation is not different from that of a total absence of earth and gravel."

The California Supreme Court enunciated this doctrine with approval as recently as 1937 in *Christin v. Superior Court, supra,* where it said (71 Pac. (2d) at 208):

> "Modern cases recognize as a defense not only objective impossibility in the true sense, but also impracticability due to excessive and unreasonable difficulty or expense. *Mineral Park Land Co. v. Howard,* 172 Cal. 289; 156 Pac. 458; L. R. A. 1916F, 1; *People v. Meyers,* 215 Cal. 115, 8 P. (2d) 837; Restatement, Contracts, §454."

Section 454 of the Restatement of Contracts, cited with approval by the California Supreme Court in the *Christin* case, *supra,* states:

> "454. DEFINITION OF IMPOSSIBILITY. In the Restatement of this Subject impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved."

Transbay Const. Co. v. San Francisco, supra, was decided in the United States District Court for the Northern District of California by Judge St. Sure, on October 24, 1940. This case is similar in many respects to the case at bar and it is submitted that the District Judge in the *Transbay* case correctly applied the local law of California. In the *Transbay* case the plaintiff construction company, a Delaware Corporation, agreed with the defendant to furnish labor and materials for a dam enlargement. In return the defendant agreed to pay for the work upon performance. According to the plans and specifications, the amount of rock excavation was estimated at 30,000 cubic yards. It later developed that for a satisfactory dam foundation the contractor was

required to excavate 84,000 cubic yards. Plaintiff alleged that the reasonable value of the aggregate labor and materials was $4,291,628.28, that the defendant only paid $3,457,000.69 as required by the terms of the original contract, and that there was still owing a balance of $834,627.59 for reasonable value of labor and materials furnished. The contract, in many respects quite similar to the one involved in the case at bar, had provisions requiring the bidders to make a personal examination of the proposed work, stipulating that the quantities were estimates only and that the right to increase the amount of work was reserved to the defendant, and specifically providing that the contractor should make no claim for damages or extra payment. The defendants stood upon the strict letter of the contract, contending that the plaintiff took all risks and must assume all losses. It was argued that when work is rendered more difficult or expensive by the happening of an unforeseen contingency, performance is not excused and there is no basis for a claim for additional compensation. The court, refusing to accept this argument, found for the plaintiff, saying:

> "Under the facts and circumstances shown by the record, I feel that it would be unjust to permit defendant to strictly enforce the contract against plaintiff. Circumstances unanticipated by the parties made radical changes in the character and amount of the work to be performed under the contract, greatly increasing the expense thereof. I think that the contract may be deemed abrogated and plaintiff should be permitted to recover on a *quantum meruit* basis. (Citing cases.)"

It is respectfully submitted that the facts of the case at bar bring it within the above discussed rule of Cali-

fornia law. It is submitted that the District Judge disposed of the instant case in a manner inconsistent with the law of California when he ruled that as a matter of law the Company was not entitled to *quantum meruit* recovery for the reasonable value of work and materials furnished, and it is submitted that the Judge was guilty of prejudicial error in granting the District's motion to strike paragraph XI [R. 17-22] of the Company's original complaint wherein part of the geologist's report was set out and wherein it was alleged that both parties entered into the contract believing the underlying conditions to be as therein described [R. 51-52]. It is further submitted that the District Judge committed prejudicial error inconsistent with the law of California in refusing to admit the report of the District's geologist in evidence [R. 765] and also in refusing to receive testimony tending to show the conditions believed by the parties to exist when the agreements were executed [R. 763]. The above rulings prevented the Company from developing and introducing evidence to support the theory in accord with the law of California that the actual conditions under which the tunnel construction had to be carried on were so radically different from the conditions believed by both parties to exist when the agreements were executed that the original agreement should be regarded as abrogated and a *quantum meruit* recovery allowed the Company. No formal rescission is necessary as a condition precedent. Cf. *Transbay Const. Co. v. San Francisco, supra.* It is also submitted that, in addition to the above erroneous rulings, the District Judge committed further prejudicial error by failing to apply the law of California as above discussed and by failing to allow the Company *quantum meruit* recovery on its second cause of action.

II.

The Disposition of This Action by the Lower Courts, if Allowed to Stand, Would Amount to a Gross Miscarriage of Justice, Inequitably Removing the Unfortunate But Fortuitous Construction Burden From the People of California Who Derive All of the Benefit From the Completed Work and Are Better Able to Stand the Added Cost, and Thrusting It Upon the Shoulders of the Innocent Contractor Who Derives No Benefit, Is in No Way Responsible for its Presence, and Who Is Less Able to Support Its Weight.

The court is requested to grant the Company's petition for certiorari for the further reason that the adjudication of the lower courts, if allowed to stand amounts to a flagrant and large-scale miscarriage of justice. Under the circumstances set forth in the petition, the Company furnished labor and materials of the reasonable value of $2,502,598.04 in payment for which it received only the sum of $1,346,720.75 [R. 284-86]. These are the figures contained in the statement of the second cause of action in the Company's amended complaint [R. 29] and it would seem that for the time being at least, in view of the stipulated postponement of any proof on damages [R. 425-26], they must be taken as indicative of the great disparity between the reasonable value of the work performed and the amount paid to the Company for such work. The complete benefit of all such labor and materials was derived by the District and ultimately by the people of California. The District took over the work and continued it, utilizing all of the Company's labor and equipment. It should be noted that the District in completing the tunnel encountered obstacles similar to those encountered by the Company; so great were the difficulties that

the District met with that it altered the direction of the tunnel as the Company had sought to do, tacitly admitting that the work could not practicably be completed in accord with the original plans [R. 1079, 1082, 1086]. The finished work would have cost substantially more than was originally anticipated no matter who had done it. And there is no question but that all of the benefits of such work accrued exclusively to the District and the people of California. Not only is it obviously fair to make the District and the people of California rather than the Company pay for these benefits, but it is also true that the Company is far less able to stand the burden of such costs.

Particularly, should the burden be made to follow the benefits when, as in the case at bar, the original agreements were patently one-sided in favor of the benefited party. When the original contracts were signed, neither party had any idea of the misfortunes which were to follow. In the execution of the agreements, however, the Company was at the mercy of the District, being in a position somewhat analogous to an insurance applicant who is proffered a stereotyped form of policy prepared by the insurer. The District had prepared the agreement and according to its terms all doubts were resolved in its favor; in the words of the trial judge it ". . . is a very onerous contract, it is a one-sided contract . . . we find throughout this contract obligations assumed by the contractor without corresponding obligations on the opposite side. We have a contractor surrendering, as to many im-

portant matters, his right to a judicial determination of certain facts, and accepting instead the *ipse dixit* of the Department . . ." [R. 392]. The presence of such a situation presents an additional reason why the Court should not allow this case, as disposed of by the lower courts, to stand without further review; under such circumstances the Company should be afforded every opportunity of escaping from the teeth of an inequitable contract.

III.

A Pronouncement by This Court Upon the Legal Issues Involved in This Case Will Do Much to Promote the Equitable Clarification of an Important Doctrine of Contract Law.

The decisions of the lower courts will only serve to prolong in America the unqualified existence of the antiquated and inequitable rule of contract law that only absolute objective impossibility is sufficient to abrogate an express contract. Modern courts and textwriters have, with some success, been attempting to mollify the harshness of this ancient concept.

> *Cf.* 6 *Williston, Contracts* (Rev. Ed. 1938), §1931; *Restatement, Contracts* (1932), §454.

A pronouncement on the subject by this Court in addition to promoting the ends of justice, will also prevent the petrification in a new and different commercial world of an antique legal thesis designed to answer the needs of the middle ages.

IV.

Even Though the Original Contract Is Not to be Deemed Abrogated in Its Entirety, the Lower Court Failed to Apply California Law in Holding That the Company Could Not Recover in Quantum Meruit After the District Wrongfully Withheld Progress Payments and Seized the Work.

It is also submitted that the lower courts failed to apply applicable California law in disposing of the other argument advanced by the Company, *i. e.*, that on January 15, 1935, the District was already guilty of a breach of the contract by reason of its refusal to pay the December progress payment and that the District could not at that time attempt to invoke the contract provisions relative to delay in order to oust the Company and take over the work. Under California law it is clear that such a refusal to pay installment payments is a sufficient breach of the agreement to put the District in default.

S. F. Bridge Co. v. Dumbarton L. & I. Co., 119 Cal. 272; 51 Pac. 335 (1897).

The Company did not, by reason of the fact that it stated several causes of action in its complaint in this suit, one of the causes of action being on the contract for damages and another in *quantum meruit* for the value of the work done, thus deprive itself of the right to recover in *quantum meruit.*

Bancroft v. Woodward, 183 Cal. 99 at 102; 190 Pac. 445 (1920).

Conclusion.

For the reasons heretofore set forth, the petitioner respectfully prays that this Court grant its petition for certiorari.

ARTHUR E. MORETON,
Attorney for Petitioner.